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Nos. 89-692, 89-805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BIG APPLE INDUSTRIAL BUILDINGS, INC., AROL I. BUNTZMAN and MARTIN WILLIAM HALBFINGER, ESQ.,

Petitioners,

—v.—

THE PROCTER & GAMBLE COMPANY and RIVERVIEW PRODUCTIONS, INC.,

Respondents.

AMERICAN INTERNATIONAL CONTRACTORS, INC.,

Petitioner,

—v.—

THE PROCTER & GAMBLE COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court invoke its certiorari jurisdiction to reconsider the precise issue it decided just several months ago in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), where

(a) no reason is advanced for such an unusual exercise of the Court's discretion apart from petitioners' general disagreement with the result in *H.J. Inc.*;

(b) RICO is clearly constitutional as applied to petitioners' alleged frauds, and petitioners do not and cannot claim lack of fair notice that their conduct, as alleged in the complaint, violated well established proscriptions of the criminal law; and

(c) petitioners' constitutional vagueness claim (which was not raised in the District Court or the Court of Appeals) was recently rejected by this Court in *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989), with respect to a virtually identical state RICO statute?

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RULE 28.1 STATEMENT

D'Arcy Masius Benton & Bowles, Inc. is the parent company of respondent Riverview Productions, Inc.

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The petitions do not present any issue meriting review by this Court.

The Court of Appeals, in reinstating respondents' complaint, employed a definition of RICO's "pattern of racketeering activity" element wholly consistent with this Court's recent decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989). The "pattern" allegations here plainly sat-

isfy the pleading requirements of "continuity plus relationship" as set forth by this Court in that case. *Id.* at 2900. Accordingly, the Second Circuit's decision—adhered to by that Court upon application for rehearing filed by petitioners *after* the decision in *H.J. Inc.*—does not warrant further review.

Nor is the supposed constitutional vagueness of RICO a basis for granting the petitions. The claim was not raised below and no sufficient reason appears why it should be resolved in the first instance by this Court. In any event, the RICO "pattern of racketeering" requirement is constitutional as applied to petitioners' conduct. The claim of lack of fair notice is also belied by petitioners' knowledge that the alleged conduct violated *some* law, even if it were true that they could not have realized it would be held to violate RICO; there is no argument that the multiple underlying predicate acts of mail and wire fraud are unconstitutionally vague. Finally, this Court's recent decision in *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989)—rejecting a constitutional vagueness challenge to virtually identical provisions of the Indiana state RICO statute—completely disposes of petitioners' constitutional claim.

For the most part, the petitions constitute an undisguised request that this Court overrule its several months old decision in *H.J. Inc.*—with no reason offered for such an extraordinary step except the arguments contained in Justice Scalia's concurrence but rejected by a majority of the Court.[1] This Court has repeatedly said that if RICO is being "abused" by application

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1 The only supposed distinction said to justify reconsideration of the pattern of racketeering definition is the specious argument that *H.J. Inc.* was somehow different because it involved "inherently criminal conduct" whereas the criminal fraud allegations in this case relate to "an ordinary construction dispute arising out of a typical commercial transaction." (Petition of American International Contractors, Inc. ("Fuller Pet.") 6.) Otherwise, petitioner is frank to say it seeks review on the ground that *H.J. Inc.* was badly reasoned. (*E.g.*, Fuller Pet. 5, 7-9.)

American International Contractors, Inc. was previously known as the George A. Fuller Company and filed its petition under that name. In conformity with the petition, American International Contractors, Inc. is referred to in this brief in opposition as "Fuller."

to disputes not anticipated to be within its scope, then Congress may rewrite the statute. *E.g.*, *H.J. Inc.*, 109 S. Ct. at 2905. Dissatisfaction with the statute does not, however, warrant review by this Court of the manifestly correct decision of the Court of Appeals in this case.

STATEMENT OF THE CASE

1. The Facts

The facts giving rise to this case are briefly recounted in the opinion of the Court of Appeals. (App. A at pp. A-2 to A-5 and A-12 to A-14.)[2] The petitions, however, do not fully or fairly recite the material allegations of respondents' complaint that are pertinent to consideration of the Question Presented. Accordingly, we summarize them here.[3]

This case arises out of the now dormant Riverview studios project, a proposed complex of television studios and produc-

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2 Citations to "App. A" are to the opinion of the Court of Appeals reprinted as Appendix A to the Fuller petition. The opinion is reported at 879 F.2d 10 (2d Cir. 1989).

3 Because petitioners seek review of a judgment dismissing the RICO cause of action for failure to state a claim, Fed. R. Civ. P. 12(b)(6), the alleged facts must be read in the light most favorable to respondents. *E.g.*, *H.J. Inc.*, 109 S. Ct. at 2906; *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Petitioners disregard this requirement. Their claim of "certworthiness" is wholly premised on dissenting Judge Winter's conclusory characterization of petitioners' alleged frauds as mere "acts directed at a small number of related commercial entities capable of quickly learning the true facts." (Petition of Big Apple Industrial Buildings, Inc., Arol I. Buntzman and Martin William Halbfinger, Esq. ("Big Apple Pet.") 6.) As noted in the Court of Appeals majority opinion, that assessment of the complaint

> apparently ignores the fact that the instant litigation is only at the pleading stage. Whether [petitioners'] actions are continuing in nature or isolated or sporadic will be the subject of proof at trial. The accepted-as-true allegations in the complaint refute the view that [petitioners'] fraudulent actions towards [respondents] were unrelated or disconnected. Hence, the spectre of continuity of criminal offenses in the pattern of activity is sufficiently pleaded to withstand dismissal at this stage of the litigation.

(App. A at A-14.)

tion facilities in New York City. The complex was intended to be used for the production of three soap opera serials owned by a subsidiary of respondent The Procter & Gamble Company ("Procter & Gamble"). Respondent Riverview Productions, Inc. ("Riverview"), the lessee of the studios, was a subsidiary of the advertising agency D'Arcy Masius Benton & Bowles, Inc., and was involved in production of the shows. Petitioner Big Apple Industrial Buildings, Inc. ("Big Apple") was the owner and developer of the project site. Petitioner Arol Buntzman was Big Apple's President, and petitioner Martin William Halbfinger was their lawyer. Petitioner Fuller served as general contractor in connection with construction of the project. (App. E at A-29 to A-32.)[4]

For a period of more than two years, continuing until discovery of the frauds by respondents and the filing of the complaint in this action, petitioners are alleged to have engaged in a pattern of racketeering activity consisting of at least five separate but related fraudulent schemes.[5] The complaint alleges that petitioners first defrauded Riverview into signing and Procter & Gamble into guaranteeing a lease for three as yet unbuilt television studios, which called for the payment of rent based on the actual costs of constructing the project. In furtherance of this initial fraudulent scheme, numerous representations were made to respondents with respect to the alleged expertise of petitioners Buntzman and Big Apple and the projected costs of the studios. For example, Buntzman claimed that he had "developed the Bronx Terminal Market into the largest cash-and-carry wholesale shopping center in the world;" that he had been instrumental in the development of other major projects; and that he had been involved in other studio ventures. All of these representations were false. As respondents were later to dis-

4 Citations to "App. E" are to respondents' complaint in this action, reprinted as Appendix E to the Fuller petition.

5 Specifically, petitioners are alleged to have conducted and participated in the conduct of, and to have acquired and maintained an interest in, the affairs of an association in fact enterprise consisting of Buntzman and Halbfinger, and to have conspired to do so, through a pattern of racketeering activity, all in violation of 18 U.S.C. § 1962(b), (c) and (d). (App. E at A-67 to A-69.)

cover, Buntzman had no experience in major development or studio operation and the Bronx Terminal Market had involved only minor construction by Buntzman and was riddled with financial, legal and other problems. (App. E at A-34 to A-37.)

Buntzman also represented, both orally and in writing, that the total cost of the three television studios to be occupied by Riverview would not exceed $25 million. In part by using an estimate prepared and mailed by Fuller, Buntzman stated that the "hard" construction costs would not be in excess of $18 million and would more likely be in the range of $14 million. These representations were also false. Petitioners knew full well that these cost estimates were wholly unrealistic and they suppressed more accurate data when it was obtained. (App. E at A-37 to A-40.)

In January 1985, based on these misrepresentations, Riverview entered into a lease with Big Apple for the three as yet to be constructed studios for a term of ten years, with a ten year option term ("the Lease"), and Procter & Gamble issued its guarantee of Riverview's rental and other obligations under the Lease ("the Lease Guarantee"). As all parties well knew, the issue of projected construction cost was critical because, even though Big Apple was to build the studios for Riverview, annual rent under the Lease was to be the sum of $1.2 million, plus Big Apple's annual debt service, including amortization over a ten year period, of a permanent loan for the entire actual construction cost of the project. (App. E at A-39 to A-40.)

As the transaction was originally structured by the parties, Procter & Gamble and Riverview were to have no role in the financing of construction. Big Apple was to secure the necessary construction loan based on Procter & Gamble's Lease Guarantee. But once preliminary architectural and construction work began, with Fuller acting as general contractor, Big Apple discovered that it was unable to arrange favorable financing solely on the strength of the Lease Guarantee. Faced with the possibility that it would not be able to construct the studios and that the project would thereby be aborted, Big Apple embarked on a second fraudulent scheme, to induce Procter & Gamble to

agree to obtain and guarantee a construction loan. (App. E at A-40 to A-45.)

The most prominent feature of this scheme related to an estimate of hard construction costs, which was prepared by Fuller and was to have been shared with all parties and used as a basis for arriving at an estimated construction cost for purposes of certain provisions in the Lease. When Fuller's analysis showed that Fuller believed the true hard costs would be more than twice what had previously been represented, petitioners suppressed it. They then hired other estimators, to whom they gave inaccurate and incomplete information so as to ensure that the estimate would be closer to the earlier figures, allaying respondents' concerns. (App. E at A-41 to A-43.)[6]

The result of this second scheme was an agreement by Procter & Gamble to become involved with the financing of the project—a need that petitioners had not anticipated when they commenced their earlier fraudulent scheme to induce agreement on the Lease, and, correspondingly, an obligation that respondent Procter & Gamble had not previously assumed. In a document known as the Tri-Party Agreement, executed six months after the Lease, Procter & Gamble agreed to guarantee up to $25 million of construction financing to be provided by Citibank. If, despite Big Apple's satisfaction of certain "Requisition Requirements," Citibank or any other construction lender failed to fund a requisition for "Actual Construction Costs," Procter & Gamble agreed to do so itself, subject to the same $25 million limit. (App. E at A-44.)

By early 1986, the $25 million limit was reached. On a requisition by requisition basis, Procter & Gamble extended its guarantee and Citibank increased the amount of the construction loan. During this period of time, as costs continued to escalate, petitioners continued to mislead Procter & Gamble and River-

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6 Fuller seeks to minimize its role in the alleged misconduct. (Fuller Pet. 3, 15.) In fact, as more fully developed below, Fuller's participation in this fraud relating to suppression of its cost estimate, beginning in early 1985, was only the first of numerous acts of mail and wire fraud more than sufficient to demonstrate a threat of continuing criminal behavior. *See* pp. 11-14 *infra*.

view as to the anticipated cost and continued to hide the Fuller estimate. (App. E at A-44 to A-45.)

A total of $32 million in hard and soft costs was advanced by Citibank and guaranteed by Procter & Gamble. These funds were disbursed to Big Apple from June 1985 to April 1986, upon presentation by Big Apple of eleven separate requisitions to Citibank. Each requisition was accompanied by certifications made by petitioners that the sums requisitioned represented "Actual Construction Costs," as defined in the Lease. In fact, as Procter & Gamble and Riverview later learned, the requisitions and related documents were part of still further frauds, the object of which was to misappropriate and divert construction loan funds, which would ultimately burden Procter & Gamble and Riverview through ten years of rental payments. (App. E at A-45 to A-51.)

As alleged in the complaint, among the millions of dollars improperly requisitioned by petitioner Big Apple over this period of nearly a year were legal fees and disbursements of $657,000 to petitioner Halbfinger, purportedly representing "Actual Construction Costs;" $625,000 in fees to Big Apple's "construction manager," even though it failed to perform the functions for which it was hired; duplicative insurance costs of at least $3 million; excessive mark-ups by petitioner Fuller; Christmas bonuses for Fuller payroll employees; unnecessary brokerage fees for so-called "risk management" services; winterization charges already included in subcontractors' bids; and charges attributable to portions of the project other than those covered by the Riverview Lease. (App. E at A-46 to A-51.)

Apart from lining their own pockets, petitioners fraudulently employed the requisition procedure as a means to protect themselves against the possibility that their misbehavior would be discovered and respondents would refuse to fund the project any further. Thus, funds were requisitioned into escrow accounts, purportedly to cover "long lead items," but in actuality intended to allow construction to proceed if petitioners' frauds were detected. For the most part, these accounts appear not to have been true escrow accounts but were controlled

entirely by Big Apple, with Halbfinger as the escrow agent. Petitioners also embarked on a scheme to falsely blame construction delays on respondents and thereby to create a record for charging Riverview "interim rent"—potentially amounting to millions of dollars of further padding for their financial cushion. (App. E at A-51 to A-58.)

By April 1986, respondents had begun to discover, through various meetings and by auditing of documents reluctantly provided by petitioners, the extent to which they had been defrauded and the construction loan funds had been improperly requisitioned and applied. The result of these frauds was that, although $32 million had already been poured into the project—that is, more than had been represented as sufficient to *finish* it—the project was approximately one-third complete, with a potential total cost in excess of $100 million and no completion date in sight. (App. E at A-59 to A-62.)

2. The District Court Decision

The District Court dismissed respondents' RICO cause of action (and, because this claim was the sole basis of federal jurisdiction, the entire complaint) in a decision dated March 13, 1987.[7] The court concluded that the alleged pattern of racketeering did not possess sufficient "continuity" to fit within the statute. (App. B at A-21.)

The District Court did not address respondents' contention that petitioners had engaged in a number of continuing separate criminal schemes over a period of years, sufficient to satisfy even the "multiple scheme" requirement which had been imposed by some courts at that time. The district judge instead simply recast the complaint, contrary to a fair reading of its allegations, as charging a single scheme, implemented by

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7 The decision of the District Court is reprinted as Appendix B to the Fuller petition, at pages A-17 to A-24. The opinion is reported at 655 F. Supp. 1179 (S.D.N.Y. 1987).

"repeated fraudulent assertions." On this basis, the District Court dismissed the complaint. (App. B at A-20 to A-22.)[8]

3. The Court of Appeals Decision

Following its *en banc* decisions in *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (*en banc*) and *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir. 1989) (*en banc*)—decided after the District Court's ruling in this case—and correctly anticipating this Court's decision in *H.J. Inc.*, the Court of Appeals rejected any attempt to impose a multiple scheme requirement. (App. A at A-9 to A-10.) Instead, recognizing that the facts demonstrating continuity (or the threat of continuity) "will vary in each case," the Second Circuit concluded simply that a plaintiff must "plead a basis from which it could be inferred that the acts . . . were neither isolated nor sporadic." (App. A at A-10 (citation omitted).)[9]

Applying this standard to respondents' complaint, the Court of Appeals had little difficulty finding a sufficient pattern of racketeering allegation. The Court noted that petitioners are charged with at least five separate fraudulent schemes "on a number of fronts," involving written and oral misrepresenta-

8 The District Court also ruled against respondents in part on the ground that the frauds alleged in the complaint, though continuing, were "finite." (App. B at A-22 to A-23.) That supposed component of the continuity requirement—that the alleged scheme or schemes must have no demonstrable ending point—was rejected both by the *en banc* Second Circuit in *Beauford v. Helmsley*, 865 F.2d 1386, 1391 (2d Cir. 1989) (*en banc*), and by this Court in *H.J. Inc.*, *see* 109 S. Ct. at 2902. These holdings thus completely refute petitioners' claim that *certiorari* review is required in light of the district court's "determination of a lack of continuity," and in light of Judge Winter's conclusion that the alleged fraudulent behavior is "inherently self-limiting." (Big Apple Pet. 6; Fuller Pet. 16.) Both judges were employing an improper definition of pattern.

9 Petitioners Big Apple, Buntzman and Halbfinger challenge only the continuity prong of the continuity plus relationship test. (Big Apple Pet. 6, 8-9.) Petitioner Fuller purports to find fault with the entire *H.J. Inc.* definition of pattern of racketeering, but its only specific challenge in the context of this case is similarly to the continuity requirement. (Fuller Pet. 15-16.)

tions as to petitioners' development experience and expertise and as to construction costs, along with false and excessive invoices and certifications, all occurring over a two year period. Accepting these allegations as true upon motion to dismiss under Fed. R. Civ. P. 12(b)(6)—and noting that the evidence at trial might or might not suffice to persuade a jury that petitioners "actions are continuing in nature [rather than] isolated or sporadic"—the Court of Appeals held that "the spectre of continuity of criminal offenses in the pattern of activity is sufficiently pleaded to withstand dismissal at this stage of the litigation." (App. A at A-13 to A-14.)

REASONS FOR DENYING THE WRIT

1. The Court of Appeals decision formulates and applies a definition of "pattern of racketeering" consistent with this Court's decision in *H.J. Inc.*

The Court of Appeals adopted a flexible definition of the continuity component of a RICO pattern of racketeering:

> For the purposes of RICO, "continuity" means that separate events occur over time and perhaps threaten to recur . . . .

(App. A at A-11.) Rather than rigidly limiting the manner in which continuity may be proved (by, for example, imposing a "multiple scheme" requirement not warranted by the language or legislative history of RICO), the Court of Appeals provided several differing examples of proof of continuity. The nature of the enterprise itself (for example, an organized crime group whose very business is racketeering activity) may automatically carry with it the threat of continued racketeering activity. Alternatively, the existence of multiple schemes or a great number of predicate acts, carried out over a lengthy period of time, may provide sufficient indicia of continuity or threat of continuity. (App. A at A-10.) What matters is that there be some "basis from which it could be inferred that the acts . . . were neither isolated nor sporadic." (App. A at A-10 (citation omitted).)

This was precisely the approach followed in *H.J. Inc.* After rejecting the multiple scheme test in language mirroring that of the Second Circuit, this Court defined the continuity requirement as follows:

> We adopt a less inflexible approach that seems to us to derive from a common-sense, everyday understanding of RICO's language and Congress' gloss on it. What a plaintiff or a prosecutor must prove is continuity of racketeering activity, or its threat, *simpliciter.*

109 S. Ct. at 2901. The Court then offered examples. Continuity may be established, as the Second Circuit had previously concluded, by the sheer number of racketeering acts, "extending over a substantial period of time." *Id.* at 2902. Alternatively, a sufficient *threat* of continuity may be proved by showing that predicate acts are part of an ongoing criminal entity's way of doing business, or are a regular way of conducting an otherwise legitimate business or other RICO enterprise. Ultimately, whatever may be the manner and items of proof in a particular case, the plaintiff must establish that the predicate acts are not "sporadic activity," but instead "themselves amount to, or . . . otherwise constitute a threat of, *continuing* racketeering activity." *Id.* at 2900-01.

In sum, the first question posed by the petitions—what constitutes a RICO pattern of racketeering—was answered by this Court just five months ago, and was answered identically by the Court of Appeals in this case. The asserted need for further review is thus nonexistent.

2. The "pattern of racketeering" allegations more than amply satisfy the "continuity" component of the test set forth in *H.J. Inc.*

The complaint in this case meets the threshold pleading requirement set forth by this Court in *H.J. Inc.* As alleged with great particularity in the complaint, petitioners engaged in a series of related schemes in connection with the leasing, financing, construction and operation of the Riverview studio complex, continuing over a period of more than two years—although

contemplated by petitioners to last longer—and halted only by respondents' discovery of the frauds. Specifically, the complaint alleges:

• A scheme fraudulently to induce execution of the Lease, Lease Guarantee and related documents, carried out by misrepresentations as to Buntzman's and Big Apple's experience and expertise in custom construction and renovation work and by misrepresentations as to construction costs. This scheme began as early as April 1984 and culminated in execution of the Lease by Riverview and the Lease Guarantee by Procter & Gamble in January 1985. The consequences of this fraud would have continued throughout the ten year term of the Lease and beyond if the option term had been exercised. (App. A at A-34 to A-40.)

• A scheme—hatched upon petitioners' discovery that they would encounter difficulty in getting favorable financing without Procter & Gamble's backing—fraudulently to induce respondents to continue with the project and Procter and Gamble to guarantee financing, involving further misrepresentations and omissions as to construction costs, as well as concealment of cost estimates which would have revealed the true construction cost. (App. A at A-40 to A-45.)

• A scheme fraudulently to divert construction funds and charge grossly excessive professional and other fees, effected by misrepresentations as to the need for and extent of construction costs and professional and other fees. (App. A at A-45 to A-51.)

• A fraudulent scheme with the purpose and effect of building a financial "cushion" against the day respondents discovered the frauds and refused to guarantee or advance further funds, implemented by misrepresentations as to the extent of funds required to be held in escrow as assurance of payment to subcontractors. (App. A at A-51 to A-55.)

• A scheme with the twin purposes of enabling petitioners (a) to evade responsibility for construction delays properly attributable to them, and (b) fraudulently to collect "interim rent" under the Lease.

These frauds plainly amount to "a series of related predicates extending over a substantial period of time." *H.J. Inc.*, 109 S. Ct. at 2902. Moreover, the complaint contains numerous factual allegations demonstrating a threat of continuing criminal behavior extending beyond the "closed period" of time framed by the complaint, which was terminated only by respondents' discovery of petitioners' frauds. *See id.*

At every turn, petitioners reacted to unexpected developments, or to the possible unravelling of their schemes, by perpetrating new ones. Thus, having succeeded by their numerous misrepresentations in inducing respondents to do business with them (with the signing of the Lease and Lease Guarantee in January 1985), and thereafter having been confronted with their likely inability to raise funds on their own, petitioners engaged in a second fraudulent scheme to obtain Procter & Gamble's participation in securing financing for the project. This scheme involved the active complicity of Fuller, which participated in concealing the results of its cost estimate so as not to betray the falsity of petitioners' repeated earlier cost projections.[10]

This willingness to meet unanticipated difficulties in carrying out the first fraud by launching a second one, in the process saddling respondent Procter & Gamble with substantial new obligations, surely demonstrates the sort of ongoing, nonaberrational behavior that RICO was designed to cover. So do

10 Fuller's active participation in this early fraud—and its subsequent participation in other frauds, including its submission of false requisitions for construction funds and false certifications relating to the escrow accounts—completely belies its claim that the Court of Appeals improperly sustained the complaint as to Fuller solely on the basis of " 'false and excessive invoices over a period of nearly two years', by defendants *other than* [*Fuller*]." (Fuller Pet. 15 (emphasis in original).) As pleaded in the complaint, Fuller's participation in the alleged RICO, beginning in early 1985, was pervasive.

petitioners' repeated efforts to save their scheme from discovery by failing to provide requested back-up and other information, playing on respondents' then critical need to occupy the studios with the plea not to let paperwork slow down the project while promising to provide, but never producing, the documents. So do petitioners' additional misrepresentations as to the costs to complete the project, in order to induce funding of construction beyond the original $25 million limit. So does the repeated misuse of the requisition process—beginning with the very first requisition in January 1985 and continuing each and every month for over a year—with all requisitions apparently containing improper and excessive charges, including charges for work on aspects of the construction not properly allocable to the Riverview studios. In the words of this Court's recent formulation, "the[se] predicate acts or offenses are part of an ongoing entity's regular way of doing business." *H.J. Inc.*, 109 S. Ct. at 2902.

Other alleged misbehavior establishes the requisite threat of continuity in similar fashion. So, for example, requisitioning substantial sums for supposed "soft" costs such as petitioner Halbfinger's grossly excessive legal fees, and falsely charging respondents with construction delays so as to be able to collect interim rent, were separate frauds related to the construction project but not directly necessary to its accomplishment. When petitioners were presented with these additional opportunities to personally enrich themselves and to bilk Procter & Gamble and Riverview, they took them. These predicate acts are thus further evidence that petitioners "regular way of doing business" is through a pattern of criminal frauds.

Only by joining with Judge Winter in conclusorily deeming these frauds "easily discoverable"—a determination which respondents vigorously contest, and in any event one properly for the ultimate factfinder at the close of a trial—can petitioners make the claim that the complaint does not adequately plead a RICO pattern of racketeering. That approach was rejected in *H.J. Inc.* and should be rejected here.

3. RICO's "pattern of racketeering" requirement is not unconstitutionally vague.

In an effort to manufacture a "special and important reason" for grant of the writ,[11] petitioners claim that RICO's "pattern of racketeering activity" element is so vague as to violate the notice requirement that the Due Process Clause imposes on criminal statutes. (Big Apple Pet. 6-9; Fuller Pet. 11-16.) This contention, never presented to the Court of Appeals, is unworthy of review.[12]

In the first place, petitioners' challenge must fail because the statute is clearly constitutional as applied to them. *See United States v. National Dairy Corp.*, 372 U.S. 29, 33 (1963) ("In determining the sufficiency of the notice a statute must of necessity be examined in light of the conduct with which a defendant is charged."). When a criminal charge is based on actions constitutionally subject to prohibition and themselves clearly forbidden by a statute, it is no defense that the statute would be unconstitutionally vague if applied to other conduct. *United States v. Raines*, 362 U.S. 17, 21 (1960); *Williams v. United States*, 341 U.S. 97, 101-02 (1951). While there may be some difficulty in determining whether certain marginal conduct comes within RICO, there can be no question that the ongoing series of fraudulent schemes alleged here constitutes a "pattern" of misbehavior by any reasonable understanding of that term.

A defendant is constitutionally entitled to no more. This Court has repeatedly recognized that statutory proscriptions

11 U.S. Sup. Ct. R. 17.1.

12 This failure to raise the issue below is alone sufficient basis for denying review. *See, e.g., Duignan v. United States*, 274 U.S. 195 (1927) (noting that "only in exceptional cases" will this Court pass upon questions not considered below, and refusing to hear a constitutional due process challenge to a forfeiture statute not raised in the Court of Appeals, even though the issue *was* ruled on by the trial court). Moreover, contrary to Fuller's contention, petitioners' as applied constitutional challenge to RICO is not a pure question of law. *See, e.g., Coates v. City of Cincinnati*, 402 U.S. 611, 618 (1971) (White, J., dissenting) ("ruling on . . . a [vagueness] challenge obviously requires knowledge of the conduct with which a defendant is charged").

cannot be expressed with mathematical precision, and that no statute can be "defined" to include a description of every future case that might fit within it. *E.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *American Communications Association v. Douds*, 339 U.S. 382, 412 (1950). Instead, all that is required is a law "directed with reasonable specificity toward the conduct to be prohibited." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). In *Coates*, this Court struck down an anti-loitering ordinance prohibiting "annoying" behavior because

> [c]onduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard is specified at all.

Id.

The RICO pattern of racketeering element does contain such standards. To begin with, a pattern is defined to require at least two predicate acts of racketeering, here alleged to be a series of numerous mail and wire frauds. The statute thus plainly communicates that under some circumstances as few as two predicate acts of mail or wire fraud will suffice to make out a pattern. There is nothing vague or unclear about those statutes and no claim is made that petitioners' misbehavior does not properly come within them. Further, unlike the wholly subjective concept of "annoyance," the term "pattern" has an objective core definition accepted in one formulation or another by every court to have considered this issue. That is, a pattern is an arrangement or ordering of things, going beyond mere multiplicity and having some organizing principle. *See H.J. Inc.*, 109 S. Ct. at 2900-01. The legislative history of RICO has always been clear in elucidating just what that organizing principle is: RICO does not apply to predicate acts of racketeering that are isolated or sporadic, but only to multiple predicate acts characterized by relatedness and continuity, both of which are themselves terms with "imprecise but comprehensible normative"

meaning, all that is constitutionally required. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

As described in detail above, petitioners' multiple fraudulent schemes plainly meet the test of relatedness and continuity, and thus comprise a pattern under a constitutionally sufficient definition known to petitioners since passage of the statute.[13]

Moreover, petitioners' fair notice claim rings hollow in the absence of any constitutional or other challenge to the underlying mail and wire fraud allegations. Vague laws transgress the fair notice component of the Due Process Clause because they deprive a law abiding citizen of choosing how to conduct his affairs. "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Consistent with that purpose and rationale, fair notice challenges have been rejected where the presence of some other statute or parallel enforcement scheme unequivocally marked the defendant's conduct as wrongful, so that there was no doubt he had made a conscious decision to violate *some* law. *E.g.*, *United States v. Seregos*, 655 F.2d 33, 36 (2d Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *cf. United States v. Ragen*, 314 U.S. 513, 524 (1942) (defendant

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13 Petitioners attack the RICO pattern of racketeering component as if a defendant were required to look no further than the language of the statute. (*E.g.*, Fuller Pet. 13.) But the data available to a putative defendant in assessing whether his contemplated conduct will be deemed illegal is not so limited. As repeatedly defined by this Court, the issue is whether, viewing the statute and all other relevant legal materials objectively, a prospective criminal defendant has been given fair notice that his conduct violated the law. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 111 (1972) (upholding otherwise vague ordinance on strength of prior state judicial opinion limiting application of different but similarly worded ordinance); *Lanzetta v. New Jersey*, 306 U.S. 451, 453-57 (1939) (declining to uphold anti-gang statute because judicial opinion narrowing otherwise vague statutory term post-dated the convictions in that case). The legislative history of RICO, including explication of the pattern requirement, was the subject of discussion in numerous judicial opinions available to petitioners.

claimed income tax evasion statute did not provide fair notice because it required the jury to determine whether certain salaries paid to employees were "reasonable" compensation properly deductible or were, instead, nondeductible dividend payments falsely denominated as compensation to those employees; this Court rejected that vagueness claim, noting that "[a] mind intent on willful evasion is inconsistent with surprised innocence").

Finally, petitioners' attack on the RICO statute ignores this Court's recent decision in *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989), upholding the Indiana state RICO statute in response to an identical void for vagueness challenge.[14] Because the Indiana statute tracks in pertinent part the language of the federal RICO statute, prohibiting a "pattern" of multiple violations of certain enumerated substantive crimes, the decision in that case is squarely on point.[15]

In *Fort Wayne Books*, the defendant was charged with RICO offenses under the Indiana statute where the underlying acts were violations of the state's obscenity statutes. On appeal he challenged the use of state obscenity statutes as a basis for a RICO prosecution, and also challenged the state RICO statute itself on vagueness grounds. In rejecting these challenges, this Court stated unequivocally:

> Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague,

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14 Chief Justice Rehnquist and Justices White, Blackmun, Scalia and Kennedy joined in the portion of the Court's opinion in *Fort Wayne Books* upholding the Indiana RICO.

15 The only difference is the presence in the Indiana statute of language requiring that the underlying racketeering acts "have the same or similar intent, result, accomplice, victim, or method of commission, or that [they be] otherwise interrelated by distinguishing characteristics that are not isolated incidents." Ind. Code § 35-45-6-1(2). That additional language is almost identical to the language defining "pattern" in the Dangerous Special Offender Sentencing Act, 18 U.S.C. § 3575(e), which this Court has said is to be used in assessing the relatedness of the predicate acts under federal RICO. Thus, the statutes are effectively identical.

> the former cannot be vague either. At petitioner's forthcoming trial, the prosecution will have to prove beyond a reasonable doubt each element of the alleged RICO offense, including the allegation that petitioner violated (or attempted or conspired to violate) the Indiana obscenity law. . . . Thus, petitioner cannot be convicted of violating the RICO law without first being "found guilty" of two counts of distributing (or attempting to, or conspiring to, distribute) obscene materials.

Id. at 925.

In fact, this Court concluded that the RICO law—by virtue of the pattern requirement—was necessarily *less* vague than any of the underlying offenses might be standing alone:

> [B]ecause the scope of the Indiana RICO law is more limited than the scope of the State's obscenity statute—with obscenity-related RICO prosecutions possible only where one is guilty of a "pattern" of obscenity violations—it would seem that the RICO statute is inherently *less* vague than any state obscenity law: a prosecution under the RICO law will be possible only where all the elements of an obscenity offense are present, and then some.

Id. at 925 n.7.

Accordingly, here, as in *Fort Wayne Books*, because the underlying substantive violation is not unconstitutionally vague, a RICO prosecution based on a pattern of such conduct cannot be challenged on void for vagueness grounds.

The holding of *Fort Wayne Books* is in keeping with a series of decisions in the lower federal courts, over a period of more than fifteen years beginning shortly after passage of RICO, finding the statute not unconstitutionally vague. *United States v. Aleman*, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) (term "enterprise" broad but not vague); *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir.), *cert. denied*, 441 U.S. 933 (1979) (§ 1962(c), including term "pattern of racketeering," is not vague); *United States v. Herman*, 589 F.2d 1191, 1198 (3d Cir. 1978), *cert. denied*, 441 U.S.

913 (1979) (same); *United States v. Hawes*, 529 F.2d 472, 478-79 (5th Cir. 1976) ("enterprise" broad but not vague); *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976) (§ 1962 as a whole not vague and terms "enterprise" and "person" not vague in particular); *United States v. Parness*, 503 F.2d 430, 440-42 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (rejecting contention that "pattern of racketeering activity" is void for vagueness).

For all these reasons, the constitutional vagueness claim, like petitioners' other arguments, provides no basis for review.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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